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In The

Supreme Court of the United States

October Term, 1982

JAMES C. LaBAR, DONALD J. ROMANOWSKI, LaBAR ENTERPRISES, INC. and LaBAR TRANSPORTATION CORPORATION,

Petitioners.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the regulations upon which the government's case was premised failed to give notice of what conduct was prohibited, thereby violating petitioners' rights of due process?

2. Whether the petitioners' establishment of an affiliate fuel purchasing company and the seeking of reimbursement from the Postal Service for fuel costs represent a reasonable construction of the Postal Service contract?

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OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Pennsylvania, which was affirmed on appeal, is reported at 521 F.Supp. 203 (M.D.Pa. 1981). A copy of this opinion is printed in the appendix at 4a.

The pre-trial opinion of the United States District Court for the Middle District of Pennsylvania is reported at 506 F.Supp. 1267 (M.D.Pa. 1981).

The judgment order of the United States Court of Appeals for the Third Circuit, affirming the judgment of the United States District Court is not yet reported. A copy of this judgment order is printed in the appendix at 1a.

JURISDICTION

The judgment of the United States District Court of Appeals for the Third Circuit, reprinted in the appendix at 1a, was entered on June 10, 1982. A timely petition for rehearing was denied on July 12, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution:

> Amendment V:
>
> > No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

United States Code, Title 18:

> §371. Conspiracy to commit offense or to defraud United States
>
> > If two or more persons conspire either to commit any offense against the United States, or

to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office of authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be

fined not more than $1,000 or imprisoned not more than five years, or both.

United States Code, Title 39:

§5203. Authorization of service by carrier

• • •

(b) A carrier shall transport mail offered for transportation by the Postal Service in the manner, under the conditions, and with the service prescribed by the Postal Service. A carrier is entitled to receive fair and reasonable compensation for the transportation and service connected therewith.

• • •

(e) No carrier shall be required to serve territory it is not otherwise authorized to serve, to provide service for the Postal Service at a rate which is less than compensatory cost, or to provide service at a detriment to the carrier or its other customers.

• • •

Postal Service Contracting Manual:

19-316.21 Advertised Contracts. Increased costs resulting from changed conditions occurring during the contract term may be compensated for by an increase in the compensation paid under the contract. Decreased costs resulting from such

changed conditions may also be reflected in a reduction in the contract rate, provided the contractor consents. Adjustments made under the subparagraph are limited only to increased or decreased costs directly attributable to changed conditions, except that for changes requiring the use of new capital plant or equipment, the adjustment may include a reasonable percentage return on investment for such new capital plant or equipment. Changed conditions are defined as those brought about by external forces over which the contractor has little, if any control. * * *

STATEMENT OF THE CASE

The present appeal involves a highly unusual criminal case in which petitioners, two individuals and two corporations, have been held criminally liable without notice or fair warning that their activities would be prosecuted by the government and liable for their interpretation of their contract with the Postal Service and associated complex, unique and often ambiguous governmental regulations and guidelines.

This Court has recently accepted for review a number of cases, arising in both the civil and criminal contexts, involving questions regarding the due process sufficiency of notice provided in statutes and governmental regulations. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ____ U.S. ____, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *reh. denied*, ____ U.S. ____, 102 S.Ct. 2023, 72 L.Ed.2d 476 (1982); *City of Mesquite v. Aladdin's Castle, Inc.*, ____ U.S. ____, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). This case presents equally important questions of notice. Postal Service civil regulations carrying no

criminal penalty have been used by the government to prosecute the petitioners.

James C. LaBar began business operating a gas station near Berwick, Pennsylvania 30 years ago. His business subsequently expanded into other areas. In 1968, one of his companies began contracting with the Postal Service for the hauling of mail. Such mail hauling contracts are awarded through competitive bidding, generally for a term of three or four years and covering specified routes. By 1975, LaBar Transportation Corporation ("LaBar Transportation") held approximately 30 mail hauling contracts with the Postal Service, with roughly half of these contracts having been acquired that year. At all times material, LaBar Enterprises, Inc. ("LaBar Enterprises") was the sole shareholder of LaBar Transportation, and Donald J. Romanowski was Vice President and Treasurer of both corporations. By 1977, LaBar Transportation consumed over two million gallons of diesel fuel per year in operating the contracts, and was one of the largest bulk mail contractors in the eastern United States.

In 1980, LaBar, Romanowski, and the two corporations were indicted[1] for conspiracy, mail fraud and false statements.[2] "The government's entire theory of the case was that the defendants sought fuel cost increases to which LaBar Transportation was not entitled under applicable regulations." (34a).[3]

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1. Another individual and a third corporation, Petroleum Suppliers, Inc., were also indicted.

2. The district court entered judgment of acquittal on all false statement counts at trial.

3. *United States v. LaBar*, 521 F.Supp. 203, 219 (M.D.Pa. 1981).

The present Postal Service was created by Public Law 91-375, which became effective January 20, 1971. The enactment placed upon the Postal Service the duty to carry the mails, 39 U.S.C. §5001, and authorized it to obtain mail transportation from private carriers, 39 U.S.C. §5005. Under §5203(b), postal contractors are guaranteed fair and reasonable compensation:

> A carrier shall transport mail offered for transportation by the Postal Service in the manner, under the conditions, and with the service prescribed by the Postal Service. A carrier is entitled to receive fair and reasonable compensation for the transportation and service connected therewith.

Subsection (e) of §5203 expressly provides that no contractor is to carry mail at less than its cost:

> No carrier shall be required . . . to provide service for the Postal Service at a rate which is less than compensatory cost, or to provide service at a detriment to the carrier or its other customers.[4]

The Postal Service guidelines embrace this policy when addressing the basic intent of the relevant statutes affecting Postal Service contracts:

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4. The House report on subsection (e) specifically states that the subsection:

> makes clear that a carrier *may not be required . . . to provide service at less than full cost* or at a detriment to the carrier or its other customers.

1970 U.S. Code Cong. & Admin. News 3686 (emphasis added).

> The law provides that the adjustment of contract pay may be made when *changed conditions* have occurred during the contract term. Changed conditions are those brought about by external forces over which the contractor has *little if any control*. . . . It is the intent of the law that contractors will not be forced into situations which require them to carry mail at a loss. Contractors do have a right to expect a fair return for their work which will permit them proper standard for living.

Regional Instruction, Part 500 Transp., 698-T-140, No. 523, Nov. 21, 1972, §II. A & B. (emphasis added).

The Postal Service's contracts for carriage, which are executed without negotiation or change by the bulk mail contractors, incorporate a large number of boilerplate provisions from the Postal Service Contracting Manual and include a schedule of costs, the so-called "line items" such as insurance costs, fuel costs, labor costs, taxes and depreciation. The Contracting Manual also provides a procedure by which such "line item" costs can be adjusted during the course of a contract by appropriate increases in compensation:

> Increased costs resulting from *changed conditions* occurring during the contract term may be compensated for by an increase in the compensation paid under the contract. Decreased costs resulting from such changed conditions may also be reflected in a reduction in the contract rate, provided the contractor consents. Adjustments made under the subparagraph are limited only to increased or decreased costs directly attributable to changed conditions. . . .*Changed conditions* are defined as those brought about by external forces

> over which the contractor has *little if any control*. . . .

Postal Contracting Manual §19-316.21 (Advertised Contracts) (emphasis added). The district court correctly concluded that the regulations and other directives governing the contractual relationship are crucial to the government's case, and that the case in turn depends largely upon interpreting crucial terms found in the regulations, such as "changed conditions" and "little if any control."

> The court finds the government's attempt to divorce this prosecution from the postal regulations to be unpersuasive. The court in its opinion denying the defendants' pretrial motion to dismiss the indictment [on the ground that the regulations failed to provide fair warning] stated at that time that the indictment charged conspiracy and mail fraud and did not charge defendants with violating Postal Service regulations. *United States v. LaBar*, [506 F.Supp. 1274 (M.D.Pa. 1981)]. At that time, the court, of course, could not know the manner in which the government would attempt to prove its case against defendants. Now that the trial has been completed, the court agrees with the defendants' contention that the phrases "little if any control" are crucial to the government's case. . . .

(33a-34a).[5]

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5. *United States v. LaBar*, 521 F. Supp. 203, 219 (M.D.Pa. 1981).

The procedure for seeking increases for "changed conditions" over which there was little or no control is for the contractor—such as LaBar Transportation—to submit a fuel cost adjustment request. Changed conditions did occur during LaBar Transportation's operation of the Postal contracts: changes caused by the Postal Service itself when it altered the regulations governing the rate of recovery of fuel costs.

Through 1974 LaBar Transportation recovered its actual fuel costs dollar-for-dollar because the Postal Service fully reimbursed actual fuel costs. In 1975 the Postal Service acted directly contrary to Congress' basic intent and denied mail hauling contractors full reimbursement for their actual fuel costs. The Postal Service directed that contractors would be reimbursed only for a fuel cost increase greater than five percent of the existing reimbursement rate.[6] This change occurred just after LaBar Transportation doubled its contractual commitments to the Postal Service.[7]

On July 19, 1975, changing the fuel reimbursement rules just days after final and unchangeable bids had been submitted by

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6. An earlier change, implemented in October of 1974 and limiting fuel cost adjustments according to (usually lesser) increases in the Consumer Price Index, was also a departure from full reimbursement, but its effect on major contractors such as LaBar Transportation was less drastic.

7. In 1975 the Postal Service initiated a system of Bulk Mail Centers, generally located in a central non-urban area in order to draw local mail from a wide area to this non-congested central point. In mid-1975 construction of a large number of these planned Bulk Mail Carriers was completed. In connection with the new centers, the Postal Service let out for bid a large number of new transportation contracts. LaBar Transportation successfully bid on many of these new contracts and in early July 1975, thereby doubled its fuel requirements for bulk mail hauling.

LaBar Transportation on a large number of contracts, the Postal Service established the five-percent threshold criterion for allowable reimbursement of fuel price increases.[8] This approach was instituted by an internal Regional Instruction, not by a change in the Contracting Manual or by amendment of the general provisions of the contracts with the carriers.[9] This meant, for example, that if fuel which had been an average of 50.0 cents a gallon in August 1975 rose to an average of 52.0 cents a gallon in September, an adjustment based upon the 2.0 per cent gallon increase would be automatically denied and never thereafter recovered, since 2.0 cents is less than 5 percent of 50.0 cents. If in December the average price rose a second time by an additional cent to 53.0 cents, the prospective-only adjustment would be allowed, since 3.0 cents is more than 5 percent of 50.0 cents. However, the extra 2.0 cents in costs incurred in September, October and November and the extra 3.0 cents in December would never be recovered.[10] The Postal Service's unilateral decision not to reimburse mail hauling contractors in full for their fuel costs was an adverse change in economic conditions of the first

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8. Regional Instruction, Part 500 Transp. 876-T-158, No. 523, §VII.H.6. In September 1977, the threshold was reduced to 3.5%.

9. Regional Instructions are internal documents governing the Postal Service's negotiations for increased costs with carriers. The Regional Instruction, rather than being used as a *guideline* in negotiations, was universally applied by the Postal Service as a *dispositive rule*. That is, if the five percent standard was met, the increase would be considered, but if it was not met, an adjustment was automatically denied.

10. This approach would hold true for approximately six months, at which point a prospective-only recognition of the cumulative increases could be sought without regard to whether the five percent threshold had been exceeded.

magnitude and a change over which none of the thousands of mail contractors had any control.[11]

Mail contractors became concerned as to how to deal with the adverse impact of the unilateral Postal Service change in fuel cost reimbursement. The device which many major contractors utilized was the creation and operation of subsidiary fuel companies. The use of subsidiary fuel companies had received sanction in 1973 in the form of a Postal Service legal opinion, issued in response to an inquiry concerning a mail hauling contractor having an ownership interest in a corporation from which he was purchasing gasoline at a marked up price of two cents per gallon (86a). The legal opinion, written by an Assistant Regional Counsel, concluded that *the purchase of fuel from an affiliated company was permissible.* For the entire period covered by the indictment, this opinion existed alongside the regulation ostensibly prohibiting cost increases over which a contractor had more than "little or no" or "little if any" control.

Major mail contractors, before and especially after the imposition of a threshold level for fuel cost increase reimbursement, consistently exceed the threshold level and received higher fuel price reimbursements than they would otherwise have been entitled. This was accomplished through the use of subsidiary fuel companies. The purchasing of fuel from a single source, a fuel supplier directly or indirectly affiliated with the carrier,[12] had several advantages for these contractors: (1) the existence of billing procedures which assured that the requisite threshold would be

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11. While the Postal Service has thousands of mail contractors, most operate on modest level and only a relative handful, on the level of a major contractor such as LaBar Transportation.

12. At least nine of the bigger carriers in the East and others throughout the country had controlled fuel subsidiaries.

exceeded in any given billing period, thereby securing reasonably complete fuel cost reimbursement; and (2) the generation of gross profit, and normally net profits as well. This practice was generally understood and accepted by the Postal Service officials with whom the contractors dealt.

The manner in which the Postal Service permitted other major mail hauling contractors to operate with controlled fuel purchasing companies is demonstrated by the preindictment depositions of four contractors, taken by counsel for the appellants and the government and part of the record below. The four mail hauling contractors stated that the Postal Service authorized the establishment of controlled fuel supply companies. Each of the four fuel supply companies was owned by relatives, had common ownership, or were otherwise controlled or affiliated. These four contractors completely controlled prices by marking up fuel prices from five cents to 12 cents per gallon. Included in these mark-ups were as much as eight or nine cents per gallon in profits. All the contractors submitted and received the marked-up prices as their fuel costs in the belief that the Postal Service authorized it and that they were entitled to the compensation claimed. All four stated that the Postal Service was fully aware of the practice, three suggested that the Postal Service had conceded the legality of the practice, and one noted that the Postal Service had even *suggested* the procedure in question. One specifically mentioned the changes in regulations to the five percent threshold level as being the motivating factor in his forming a controlled fuel purchasing company. A second has subsequently confirmed that the use of an affiliated fuel company was essential to recover actual fuel costs.

The obvious conflict between, on the one hand, the Postal Service permitting the practice of affiliated fuel companies marking up prices in response to the conditions changed by the Postal Service and, on the other hand, the vaguely worded Postal Service

regulation seemingly prohibiting cost increases over which a contractor had some undefined measure of control, was never addressed publicly in any official way until the indictment of petitioners.[13] However, in the midst of trial and on February 25, 1981, the Postal Service directed its employees to secure disclosure of "any common interest, supplier/user relationship that they have reason to believe exists before allowing adjustments in contract rates due to fuel costs." (83a-84a). Even then, there was no suggestion that the relationship of a mail contractor with an affiliated fuel company would preclude the granting of fuel cost adjustments. Even then, there was no requirement under applicable regulations or Regional Instructions that a Postal contractor make affirmative disclosure of its relationship with an affiliated fuel supplier. The requirement of affirmative disclosure did not exist until June 5, 1981, more than three months after the verdict in this case.[14]

The petitioners were indicted in the Middle District of Pennsylvania on November 20, 1980, on 21 counts of alleged mail

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13. The regulations, discussed supra, on "changed conditions" and "little or no control" were cited in the indictment. The petitioners are the first and only defendants to be prosecuted under these regulations.

14. On that date, the fuel adjustment request forms were amended by adding the language italicized:

> *I certify the fuel used on this route, totally or in part, was ☐ was not ☐ purchased from a firm in which the contractor has a business interest, i.e., the firm is a subsidiary company, a company owned or controlled by the contractor or a firm in which the contractor is in a position to exercise some management control either directly or indirectly.*
>
> I certify that the above information as stated is accurate and complete to the best of my knowledge, *and reflects the actual cost of the total fuel used on this route during the certified 28-day period.*

fraud under 18 U.S.C. §1341, three counts of false statements to a government agency under 18 U.S.C. §1001, and one count of conspiracy, 18 U.S.C. §371. The jury returned verdicts of guilty on the counts submitted to it. The district court granted motions for judgment of acquittal on all the false statement counts and only guilty verdicts on the mail fraud and conspiracy counts are presently before this Court. LaBar was fined $20,000 and placed on probation for two years. Romanowski was fined $2,500 and placed on probation for two years. LaBar Enterprises and LaBar Transportation were fined $31,000 each. Post-trial motions were denied by the district court on August 14 and September 10, and appeals were taken to the United States Court of Appeals for the Third Circuit, where argument was heard on May 28, 1982. By Judgment Order dated June 10, 1982, the judgment of the district court was affirmed. (1a). A timely petition for rehearing was denied on July 12, 1982. The instant petition to this Court followed.

REASONS FOR GRANTING THE WRIT

The court of appeals in its affirmance of the judgment and opinion of the district court has decided the issue of whether the Postal Service regulations and associated directives give fair warning, as to what conduct the government intended to make criminal, in a manner in conflict with the applicable decisions of this Court. Because the regulations upon which the government's case is premised are impermissibly vague, petitioners' convictions here are violative of due process. Were these convictions allowed to stand, all who engage in government contracting in areas where regulations conflict with approved practices will be subject to criminal jeopardy. The government's resort to criminal prosecution as a means of announcing its construction of the regulations under which the government contracts were operated must be rejected (Section A).

The Postal Service regulations and associated policy statements and directives, constitute the contract under which petitioners operated. Contrary the position of the Fourth Circuit Court of Appeals in *United States v. Race*, 632 F.2d 1114 (1980), the Court of Appeals for the Third Circuit has, in affirming the judgment and opinion of the district court, resolved contractual ambiguity in the government's favor. Interpretations of the contract supportive of petitioners' conduct in this case could not be eliminated. Because petitioners' construction of the contract was a reasonable one, the convictions of the petitioners' must be reversed (Section B).

I.

The regulations upon which the government's case was premised failed to give notice of what conduct was prohibited, and the prosecution was therefore in violation of due process.

The issue here is whether the prosecution of petitioners' for defrauding the government in pursuing fuel cost adjustments under particular Postal Service regulation should have been permitted to proceed, since they were not given fair warning that their conduct would be regarded as criminal. The district court correctly concluded that the "government's entire theory in the case was that the defendants sought fuel cost increases to which LaBar Transportation was not entitled under applicable regulations." (1a). In reaching this conclusion, the district court rejected its own pretrial ruling[15] and also the argument of the government based upon it.

> The government takes the position that even if the applicable postal regulations are vague, the

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15. *United States v. LaBar*, 506 F.Supp. 1267, 1274 (M.D.Pa. 1981).

> defendants can still properly be convicted of conspiracy and mail fraud because the elements of those offenses in the context of this case did not require proof that Postal Service regulations were violated. The government's position is that the jury could have found that the defendants acted in a manner "reasonably calculated to deceive persons of ordinary intelligence and comprehension." *United States v. Pearlstein*, 576 F.2d 531, 535 (3d Cir. 1978).
>
> The court finds the government's attempt to divorce this prosecution from the postal regulations to be unpersuasive. The court in its opinion denying the defendants' pre-trial motion to dismiss the indictment on this ground stated at that time that the indictment charged conspiracy and mail fraud and did not charge the defendants with violating Postal Service regulations. *United States v. LaBar*, 506 F.Supp. at 1274. At that time, the court, of course, could not know the manner in which the government would attempt to prove its case against the defendants. Now that the trial has been completed, the court agrees with the defendants' contention that the phrases "little or no control" and "little, if any control" are crucial to the government's case. The government's entire theory of the case was that the defendants sought fuel cost increases to which LaBar Transportation was not entitled under applicable regulations.

(33a-34a).[16] the district court improperly concluded, however, that

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16. *United States v. LaBar*, 521 F.Supp. 203, 218-19 (M.D.Pa. 1981).

the regulations gave petitioners fair warning that criminal sanctions would be imposed if they controlled fuel costs. This error in applying the decisions of this Court was compounded by the district court's apparent delegation of the issue to the jury. Clearly, however, questions pertinent to whether defendants have received fair warning of proscribed conduct is a matter for the court, and not the jury. Since the regulations provide anything but fair warning of prohibited conduct, petitioners' convictions should have been vacated and the indictment dismissed.

The vagueness and ambiguity of the regulations at issue here, correctly described as crucial to the government's case, can be clearly seen by the fact that they are susceptible to at least two different and competing constructions.[17] Petitioners' construction, derived from the 1973 legal opinion and the understanding in the industry, was first voiced in a letter written by the petitioner James C. LaBar to the Postal Service on November 11, 1977. The letter sought reimbursement for the difference between fuel cost increases and the amount allowed under the five percent threshold standard. The letter argued that the five percent criterion was inconsistent with other statutory and regulatory provisions. It referenced the provision of the Postal Manual providing that "changed conditions" are those resulting from circumstances "over which the contractor has little if any control." In essence, the letter advances the first of the two competing constructions, *viz.* that the change in fuel cost reimbursement policy to the five percent threshold criterion was itself a changed condition. Under this construction, the shift to fuel purchases from an affiliated fuel company, caused by the Postal Service's change in fuel cost

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17. The discussion hereafter ignores a further conflict in the applicable provisions of law, potential conflicts resulting from the differing terminology "little or no control", as opposed to "little if any control." Both of these terms appear in the regulations cited *supra*.

reimbursements, did not constitute a violation of Postal Service regulation.

The other and competing construction is, of course, the government's. Its interpretation was advanced in a vacuum, premised entirely upon the isolated actions of the petitioners and ignoring all surrounding circumstances pre-dating the creation of Petroleum Suppliers, Inc. Under the government's construction, the creation of Petroleum Suppliers, Inc. and its affiliation with LaBar Transportation were changed circumstances over which LaBar Enterprises had a measure of control greater than "little or no" or "little if any." The first document in which this construction has been memorialized is the indictment in the instant matter. To construe the regulations in this fashion, however, creates conflict with both the 1973 legal opinion and with the industry-wide practice of creating affiliated fuel suppliers specifically to address the imposition of the five percent fuel reimbursement threshold. This practice was countenanced by the Postal Service itself for years preceding the indictment.[18]

According to a well established principle, applicable to both civil and criminal cases, interpretation of a written contract is a matter of law for the trial court. *Evans v. Wright,* 505 F.2d 287 (4th Cir. 1974); *John McShain, Inc. v. United States,* 462 F.2d 489 (Ct.Cl. 1972); *United States v. Nickel,* 243 F.2d 924

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18. In connection with other arguments advanced in the lower courts, the government has argued that even if and assuming control over an affiliated fuel supplier was permissible, the petitioners' violation of the law results from their failure to disclose the affiliation. However, as previously noted, the district court rejected the argument that conspiracy and mail fraud convictions can be found without "proof that Postal Service regulations were violated," 521 F.Supp. at 218. (33a), and as also previously noted, no regulation required disclosure until more than two and one-half years after the end of the indictment period and more than three months after the verdict.

(10th Cir. 1957). The rule of *contra proferentem*, which requires construction of ambiguous contract clauses against the drafter, should have tipped the district court's scales in favor of appellants' interpretation of these ambiguous contractual and regulatory provisions. *See Sturm v. United States*, 421 F.2d 723, 727 (Ct.Cl. 1970); *Restatement, Contracts*, 236(d) (1932). Here, the district court improperly accepted the government's interpretation of the contract and regulations as reasonable without ever determining the reasonableness of petitioners' construction.[19]

Given the vagueness and ambiguity associated with the regulations and particularly the term "changed conditions," were the petitioners given fair warning by the government as to what conduct it intended to make criminal?

In the entire context of the mail hauling regulations, there was amply justification for proceeding with the creation of a subsidiary fuel supplier and few, if any, circumstances warranting caution in such a plan.

Fundamental principles of due process, as applied in a host of cases decided under the vagueness doctrine, mandate that legislative enactments and administrative regulations give fair warning to affected individuals of what is required of them so that no person is "forced to speculate, at the peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979); *Grayned v. Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222, 227-28 (1972). *See also, Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 58 L.Ed.2d 596, 606 (1979). Thus, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess

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19. *See* Section B *infra*.

at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Where First Amendment freedoms are not involved and the regulation in question affects purely commercial activity, the test for vagueness is whether a definite course of conduct can be discerned that the regulation forbids. *See United States v. Powell*, 423 U.S. 87, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975) (holding that the mailing of a sawed-off shotgun is within the statute prohibiting the mailing of a "concealable firearm").

The Postal Service regulations and the additional voluminous policy statements, Regional Instructions, and similar materials are of no assistance in determining what is meant by the term "changed conditions," or the terms "little if any" or "little or no" control. The government has been unable to point to any prosecution based, as this one is, upon those provisions. Neither does any document or writing prior to the indictment in this case support the application of these terms here.

Possibly the best evidence of the vague and ambiguous character of the regulations in question is the action taken by the Postal Service to clarify them after the return of this indictment. The Postal Service first issued an internal instruction during the very trial in this case requiring Postal Service officials to secure additional information when, in their judgment, that additional information was required (83a-84a). On June 5, 1981, more than three months *after the verdict* in this case, the government amended the fuel certification form in use by mail contractors, by requiring these contractors to disclose whether fuel purchases were

> from a firm in which the contractor has a business interest, *i.e.* the firm is a subsidiary company, a company owned or controlled by the contractor,

> or a firm which the contractor is in a position to exercise some management control, either directly or indirectly.[20]

For the first time, mail contractors were required to disclose on affiliate relationship.

Statutes using broad and indefinite language, similar to "changed conditions" and "little or no control", have typically been declared void for vagueness. For example, this Court has found unconstitutionally vague: a statute proscribing "any unjust or unreasonable rate or charge" for certain items of necessity, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921); a statute requiring, under threat of criminal penalties, payment of "not less than the current rate of per diem wages in the locality where the work is performed," *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); a statute imposing criminal liability upon one who is "known to be a member of any gang," *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939); an ordinance condemning in expansive terms "vagrancy", *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); and a statute imposing criminal liability on one who "treats contemptuously" the United States flag, *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974).

The most recent decisions of this Court exemplify its continuing concern with vagueness issues in contexts of both protected and unprotected activity. The circumstances of these cases and the specificity of the statutory and regulatory provisions at issue there stand in sharp contrast with the regulatory provisions involved here.

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20. *See* p. 14, n. 14, *supra*.

In *City of Mesquite v. Aladdin's Castle, Inc.*, ____ U.S. ____, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), the Court concluded that a regulation in a civil matter requiring an investigation into a licensee's connection with "criminal elements" is not void for vagueness under federal constitutional standards. The Court found that such a connection was merely a factor in, and not determinative of, the decision whether the license application would be approved. This Court noted that its concerns would be heightened considerably were such a standard the basis for a criminal prosecution. 71 L.Ed.2d at 160. Prior to the addition of a detailed definition for the terms "connection with criminal elements," 71 L.Ed.2d at 158 n. 6, those terms were as vague and ambiguous as the terms at issue here.

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, ____ U.S. ____, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982), *reh. denied*, ____ U.S. ____, 102 S.Ct. 2023, 72 L.Ed.2d 476 (1982), involving a pre-enforcement challenge to a drug paraphernalia ordinance, this Court concluded that the ordinance in question was not unconstitutional. However, in sharp contrast to the circumstances here, operable terms of the ordinance were defined in some detail in associated statutes and the licensing guidelines issued by the municipality. The Court found the activity to involve mere commercial speech (but nonetheless applied a searching analysis), expressed the view that the nature of the penalties imposed bear upon the strictness of the analysis to be applied, and noted that the regulation of "paraphernalia" alone would not provide "much warning" of the nature of the conduct prohibited. 71 L.Ed.2d at 373 n.17. In the instant case, the Court has before it the term "changed conditions", as standardless, ambiguous, and vague as the term "paraphernalia", if not more so. *See also, Ohio v. Young*, 62 Ohio 2d 370, 406 N.E.2d 499 (1980) (statute penalizing those who "facilitate" a criminal syndicate void for vagueness), *cert. denied*, 449 U.S. 905, 101 S.Ct. 281, 66 L.Ed.2d 137 (1980).

Finally, in *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), a statutory standard that, in *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), had been found not to be unconstitutional on its face, subsequently had been given, a majority of the Court concluded, such a broad and vague construction as to violate constitutional safeguards. The statute provided for the imposition of the death penalty on the basis of a conclusion that the acts of the defendant were "outrageously or wantonly vile, horrible or inhuman in that [the acts] involved torture, depravity of the mind or aggravated battery to the victim." Torture and aggravated battery had been explicitly ruled out by the prosecutor, and the Court found no basis to support the conclusion that the murder involved "depravity of the mind" any more or less than other murders. Similarly, were the Court to conclude that the regulations involved here were not facially vague, there can be no question but that all of the surrounding circumstances compel the conclusion that the regulations here are vague and ambiguous as applied.

The district court correctly concluded on the basis of the circumstances of the case that the prosecution of petitioners depended upon a demonstration that Postal Service regulations had been violated. The regulations upon which the prosecution depended are vague and susceptible of several interpretations, providing only the barest support for the government's interpretation, announced for the first time in this prosecution. All prior interpretations viewed the regulations as permitting the establishment of affiliated fuel supply companies. No regulation required disclosure of the affiliation until after trial. Clearly, the regulations upon which the government's case was premised failed to give fair warning of what conduct was prohibited. For this reason petitioners' convictions must be reversed and the indictment, dismissed. The writ should issue so that this Court can review and correct the decision of the court below.

II.

Petitioners' establishment of an affiliate fuel purchasing company and the seeking of reimbursement from the Postal Service for fuel costs represents a reasonable construction of the Postal Service contract.

The common thread of the government's proof was the assertion that certifications for fuel cost adjustments submitted under mail hauling contracts were false and fraudulent, solely because the contractor billed for fuel cost increases which the government now says were not allowed by postal regulations. Specifically, the government's theory was that petitioners "controlled" the amount of their fuel increases in violation of postal regulations. Since only "changed conditions" over which the contractor had little or no control qualified for reimbursement, conditions created by the contractor would not qualify. Proof of this theory in a mail fraud and false statements case required a threshold determination by the district court of the legal meaning of the "contract" in dispute, including applicable statutory and regulatory provisions. Only if the legal review conducted by the court led it to conclude that the fuel cost certifications were not permitted by the contract, could the jury have been allowed to consider them as evidence of fraud. The district court and consequently the court of appeals refused to conclude as a matter of law that petitioners' construction of the contract and postal regulations was a reasonable interpretation. The district court failed to apply the correct legal standard to the evidence—a determination of whether the petitioners' interpretation was unreasonable.

In *United States v. Race*, 632 F.2d 1114 (4th Cir. 1980), the Court of Appeals for the Fourth Circuit held that the district court erred in failing to dismiss as a matter of law charges based on allegedly excessive billings where the submission of such bills was authorized by the terms of the contract. The defendants in *Race*

were indicted for conspiracy and substantive violations of 18 U.S.C. §1001 arising from the submission of "false and fraudulent invoices for payment of services and materials rendered to a division of the Department of the Navy". *Id.* at 1115. The defendants had, *inter alia,* submitted invoices for certain per diem work and other invoices charging a flat 20% as materials handling expense. With respect to the invoices for per diem charges, the government contract provided that per diem would be paid in accordance with the provisions of the Military Joint Travel Regulations (MJTR) for civilians. The appropriate per diem rate, as stated in the regulations, was $33. The defendants' invoices for per diem charges sought $33 for all work done, regardless of the company's actual per diem expenditure. The appropriate construction of the contract was, except in exceptional cases, a matter for the court. *Id.* at 1117. The government interpreted the contract to the effect that the company "was only to be 'reimbursed' for its actual per diem expenditure, subject to a maximum limitation as fixed by the rate to be paid under the MJTR." *Id.* at 1118. The court found that the defendants' interpretation of the contract was a reasonable one, relying in part on prior acceptance of the now questioned procedure, and could not therefore support a prosecution under the conspiracy count or 18 U.S.C. §1001 counts.

In contrast to the Fourth Circuit's decision in *Race,* the Third Circuit, by affirming the judgment and opinion of the district court, incorrectly deferred to the jury on an issue that should have been determined by the court. This error is particularly egregious where the Postal Service fully approved mail hauling contractors controlling their fuel costs by means of a controlled fuel purchasing company. Moreover, practices countenanced, if not encouraged, by the Postal Service coincided with the petitioner's reasonable interpretation of the contract.

To be sure, the petitioners' interpretation of the contract was not the only one. The government took the position that the entry of Petroleum Suppliers, Inc. into the business of supplying fuel to LaBar Transportation was a "changed condition" over which petitioners had absolute control, and hence the government would only recognize the prices paid by Petroleum Suppliers, Inc. in purchasing fuel for LaBar Transportation's use.[21] Thus the government advanced the most narrow, inflexible, and self-serving interpretation to advance its construction of the regulations. However, the government's burden was greater. The government had the burden of negating any reasonable interpretation of the phrase that would make the petitioners' construction factually incorrect. *See United States v. Anderson,* 579 F.2d 455, 459-60 (8th Cir.) *cert. denied,* 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed.2d 651 (1978). *See also United States v. Diogo,* 320 F.2d 898 (2d Cir. 1963).[22]

Petitioners' contrary interpretation of the contract not only predates the government's, it also is based upon the 1973 legal opinion issued by the Postal Service and further is based upon the industry practice. Under this other construction, the term "changed conditions" included the unprecedented economic condition resulting from the Postal Service's refusal to reimburse for actual fuel cost increases, contrary to the Postal Service's statutory duty, the contract, and Congressional intent. Clearly, this interpretation, widely adopted in the industry, was a reasonable one.

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21. The government also recognized that increases to Petroleum Suppliers, Inc. as part of general fuel price increases were also beyond the control of the petitioners.

22. *See also,* discussion, *supra* at p. 20, regarding the doctrine of *contra proferentem.*

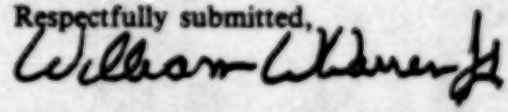
The government's interpretation of the "little or no control" phrase as precluding use of an affiliated fuel supplier is in direct contradiction to the industry practices sanctioned by the Postal Service. On examination, the major mail hauling contractors had considerable control over fuel cost. By purchasing fuel from affiliated fuel companies, these contractors controlled their mark-ups, which were passed on as increases in costs for reimbursement by the Postal Service. These mail hauling contractors with wholly controlled subsidiary or affiliate fuel purchasing companies were given greater than "little or no" control by the Postal Service over mark-ups in their submissions of fuel costs. The sudden, severe economic losses caused by change in reimbursement of fuel costs under the Postal contracts was an economic condition over which little or no control was exercised. Once again, a reasonable construction of the entire contractual relationship established the permissibility of seeking cost adjustments on the basis of price from the affiliated fuel supplier, even while the regulation prohibited reimbursement of costs over which there was some measure of control.

"Changed economic conditions" over which the contractor has "little or no control" is by no means a precise standard, particularly when viewed in the light of conflicting Postal Service practices relating to fuel cost adjustments. Yet these phrases are the very basis of this prosecution. Through the novel implementation of the mail fraud statute, the phrases have become "criminalized", as if they were set forth in Title 18. The fuel cost billings here are supported by a reasonable interpretation of the contract, statute, and regulations. Petitioners' interpretation of the phrase "changed economic conditions" to include contract losses occasioned by the Postal Service's denial of actual cost reimbursement is a reasonable construction. Any ambiguity must be resolved against the government. Judgment of acquittal must be entered in favor of all petitioners on all counts. The writ should issue so that this Court can review and correct the decision of the court below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to the Court of Appeals for the Third Circuit so that this Honorable Court may review and correct the decision below.

Respectfully submitted,



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